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Petition

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ALEXANDER L. STEVAS,
CLERK

81-684

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

No.

LAWRENCE Y. S. AU,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Lawrence Y. S. Au, pro se
Room - 1 - 1153–12th Ave.
Honolulu, Hawaii 96816

QUESTIONS PRESENTED

The questions presented are:

1. Whether the entitlement to due process and equal protection of law are matters of a *right,* or whether they are only mere *privileges,* to be discretionarily granted?

2. If such entitlement is a matter of a *right,* are issues relative thereto, properly and appropriately within the purview and jurisdiction of the Ninth Circuit Court of Appeals to review, consider, and adjudicate?

3. Did the Ninth Circuit Court of Appeals err in omission, by evading in its decision, any consideration of the fact that the Respondent had willfully violated the tenet of its decision that "deficiency procedures generally applicable to income tax collection do not apply to the assessment and collection of penalties"?
   (Appendix A)

   To wit: Respondent has employed, in the collection of penalties, *the 10 day demand letter,* the most final and devastating procedure *generally applicable to income tax collection.*

4. Employing the income tax collection enforcement procedures while denying the judicial review by withholding the 90 day letter, did Respondent willfully and capriciously deny Petitioner his constitutional rights?

10 day letter
Reg. 301.6331.1

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JURISDICTION

Petitioner respectfully submits as the bases for his petition the following:

(a) The memorandum from the Ninth Circuit Court of Appeals affirming the Order of the Tax Court, in dismissing the action for lack of jurisdiction. (Appendix A).

(b) The Notice of Entry of Judgment in the case was the file stamp date – *June 5, 1981,* on the attached decision of the Court. (Appendix A).

(c) The Petition for Rehearing was dismissed on July 14, 1981. (Appendix B).

The statutory provisions of 28 U.S.C. Sec. 1651 (a) is believed to confer on this Court jurisdiction to review said decision of the Ninth Circuit Court of Appeals by writ of certiorari.

CONSTITUTIONAL ISSUES

By using the income tax enforcement collection procedures (10 day letter), contrary to the opinion of the Circuit Court as to the inapplicability of such procedures, Respondent has violated Petitioner's constitutional rights to due process and equal protection of the law.

To wit:

Amendment 5 of the Constitution

states that no person shall be deprived of property without due process of law.

Amendment 6 of the Constitution

guarantees a speedy and public trial by an impartial jury, such as could only be afforded by a Federal District Court, where Respondent should have instituted action in the first place. The assessment of penalties must be construed as part of the criminal procedures.

Amendment 14 of the Constitution

guarantees equal protection and due process under State Laws which have licensed Petitioner to practice as an accountant. Respondent attempts to supercede the State's

regulatory laws and to operate *without* such guarantees of the 14th Amendment. Any implied grant of such power to the Respondent under 26 U.S.C. Sec. 6694–96 must be construed as unconstitutional.

STATEMENT OF THE CASE

1. Respondent collected, under protest by petitioner, $1,050 in tax preparer's penalties, using the 10 day demand letter, the enforcement collection procedure generally applicable to income tax collection.

2. The case was processed through the *Income Tax Appellate Office* with final denial made by an income tax appellate conferee.

3. In spite of the fact that deficiency procedures generally applicable to income tax collection were employed up to this point, Respondent *willfully* denied issuance of the *90 day letter,* in order to frustrate petitioner's obtaining a judicial review of the case by the Tax Court. By estoppel Sec. 6696 (b) should have been denied.

4. Upon appeal, the Tax Court denied its jurisdiction because of the lack of the pro-forma 90 day letter, in spite of arguments as to constructive issuance of the same because the income tax appellate procedures were extensively employed by Respondent.

5. In affirming the Tax Court's lack of jurisdiction, the Ninth Circuit Court of Appeals has steadfastly, even upon a Petition for Reconsideration, refused to hold Respondent accountable for the breach of the tenet of the Court's opinion that "deficiency procedures generally applicable to income tax collections do not apply to the assessment and collection of penalties." (See APPENDIX C).

6. Unless successfully challenged, Respondent's permissive conduct contrary to the tenets of the Court's opinion, violates and will continue to deny petitioner his rights guaranteed under the Constitution.

ARGUMENT

The opinion of the Ninth Circuit Court of Appeals vindicates the judicial avoidance of the case by the Tax Court because of the lack of jurisdiction. (26 U.S.C. P 7442).

However, in the logical extension of its own opinion as to the inapplicability of the usual income tax deficiency proced-

ures, the Ninth Circuit Court of appeals was remiss in failing to address itself to and act upon Respondent's non-compliance with its opinion and in totally evading the issues of the breach of the constitutional rights of Petitioner; which issues are wholly within the Courts' purview and jurisdiction to adjudicate.

There appears no justification or rationale, based on the Court's own opinion, for what amounts to be a dual standard of justice; where the opinion restricts one party to the litigation and totally ignores, or fails to consider the patent infractions by the other.

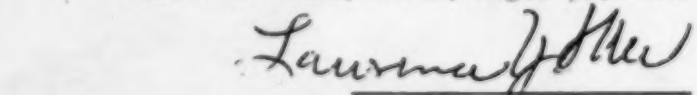
If Petitioner is denied the usual income tax appellate procedure, or the 90 day letter; then, likewise, Respondent should be denied the income collection enforcement procedure, the 10 day demand letter.

Before fines and penalties are exacted from him, Petitioner is entitled to his day in court, before an impartial jury. For that is his rights, guaranteed under the Constitution. The fines and penalties, being separate and apart from Income Taxes, should be pursued in the federal district court, where there can be no infringement of Petitioner's constitutional rights. And the initiative to bring such charges rests with the district attorney.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this court of last resort will issue the Writ of Certiorari to the Ninth Circuit Court of Appeals with the mandate to consider the constitutional issues and questions and to provide adequate redress to Petitioner for costs and damages to his professional practice, resulting from the relentless campaign of intimidation and vilification waged by Respondent's agents since the inception of this case. And for any other remedy this Court deems just and proper.

Dated: Honolulu, Hawaii, August 12, 1981.



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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lawrence Y. S. Au, Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Appellee.	FILED June 5, 1981 RICHARD H. DEANE CLERK U.S. COURT OF APPEALS No. 79–7689 Tax Court No. 12187–79 MEMORANDUM

Appeal from the Order of the
United States Tax Court
The Honorable C. Moxley Featherston, Presiding
Submitted March 2, 1981

Before: HUG, SCHROEDER and NELSON, Circuit Judges

Lawrence Au was assessed $1,050 in tax return preparer's penalties for the years 1976 and 1977. In August 1979 Au filed a petition in the Tax Court to contest the penalties. The Tax Court dismissed for lack of jurisdiction.

On appeal, Au asserts that the Tax Court did have jurisdiction, and that the motion to dismiss for lack of jurisdiction was not timely. Au further argues that the assessments were improper because he was only assisting in the preparation of returns. Finally, he argues that the assessments were arbitrary.

We conclude that the Tax Court properly dismissed the action for lack of jurisdiction. The Tax Court is a court of limited jurisdiction, having only such jurisdiction as is conferred by statute, 26 U.S.C. § 7442. The jurisdiction of the Tax Court over income tax disputes arises only where there has been a deficiency determination and a deficiency notice has been issued by the Commissioner. *See Boynton v. United States*, 566 F. 2d 50, 53 (9th Cir. 1977) and *Fendler v. Commissioner*, 441 F. 2d 1101, 1102 (9th Cir. 1971). In this case, the penalties were assessed pursuant to 26 U.S.C. § 6695–96. Section

6696(b) provides that deficiency procedures generally applicable to income tax collection do not apply to the assessment and collection of penalties. Therefore, the Tax Court properly ruled it had no jurisdiction because there has been no deficiency determination or notice.

The Tax Court, as a court of limited jurisdiction, must dismiss an action whenever lack of jurisdiction becomes apparent. Au's argument that dismissal was improper because the motion to dismiss was untimely is thus without merit.

Because we conclude the action was properly dismissed, we need not reach the other issues raised by Au.

The order of the Tax Court dismissing the action for lack of jurisdiction is Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lawrence Y. S. Au,	)	FILED
	)	JUL 14 1981
Appellant,	)	RICHARD H. DEANE
	)	CLERK
v.	)	U.S. COURT OF APPEALS
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	No. 79–7689
	)	Tax Court No. 12187–79
	)	
Appellee.	)	ORDER
	)	

Appeal from the Order of the United States Tax Court
The Honorable C. Moxley Featherston, Presiding

Before: HUG, SCHROEDER and NELSON, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the Petition for Rehearing filed by the Appellant on June 18, 1981.

The Petition for Rehearing is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

October Term, 1979

LAWRENCE Y. S. AU,	)	
	)	
Petitioner–Appellant,	)	No. 79–7689
	)	
vs.	)	
	)	PETITION
COMMISSIONER OF INTERNAL	)	FOR
REVENUE,	)	REHEARING
	)	
Respondent–Appellee	)	
	)	

STATEMENT OF CASE

In the Opinion filed June 5, 1981, this Court has concluded that:

> "Section 6696(b) provides that deficiency procedures generally applicable to income tax collection do not apply to the assessment and collection of penalties. Therefore the Tax Court properly ruled it had no jurisdiction because there has been no deficiency determination or notice."

The Court did address itself to the issue of the jurisdiction of the Tax Court. It did not address itself to the issue of the Appellee, the Commissioner of Internal Revenue, denying Appellant his rights to due process of law, through his issuance of the 10 days demand for payment, which provides for no opportunity for a judicial determination of guilt.

ISSUE FOR REHEARING

The issue, which is made the basis for this rehearing, and which this Court has yet to address itself to, is whether or not

there has been an infringement, impairment or denial of appellant's constitutional rights to a fair trial in the adjudication of guilt, before the imposition of sanctions such as fines and penalties.

This issue was addressed to in Appellant's Opening Brief:

> "2. That the respondent, the Commissioner of Internal Revenue, has been arbitrary and capricious in assessing the penalties against petitioner."

This issue was more specific and clairifed in appellant's Reply Brief:

> "3. Respondent should have initiated case against Petitioner in the Federal District Court, in order to afford Petitioner due process of law in the determination of guilt."

SPECIFIC QUESTIONS

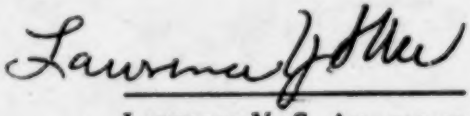
1. Whether or not the 10 day demand for payment is part and parcel of the deficiency procedures generally applicable to income tax collection, but do not apply under Section 6696(b) to the assessment and collection of penalties. And therefore the appellee, the Commissioner of Internal Revenue should have pressed his charges in the Federal District Court, rather than resorting to the use of the 10 day demand for payment.

2. If by interpretation or for any other reasons (Section 6696(b) notwithstanding) the Commissioner of Internal Revenue is empowered to use the 10 day demand for payment, whether such power is an infringement, impairment, or denial of the constitutional rights of appellant to due process of law, and the assumption of innocence of all charges until so adjudicated.

3. Whether or not this Court is properly empowered and not restricted under the circumstances in considering the constitutional questions and in adjudicating the issues in this case.

4. If this Court does not have jurisdiction over the issues in this case, what other court does?

Respectfully submitted this 15th day of June, 1981.



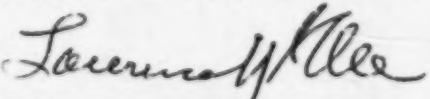
Lawrence Y. S. Au, pro se

AFFIDAVIT OF SERVICE

Affidavit of Service is hereby given, attesting to the fact that three (3) copies of the foregoing Petition for Writ of Certiorari were duly mailed to:

Solicitor General
of the United States
Room 6614
Department of Justice
Washington, D.C. 20543

Dated: Honolulu, Hawaii, September 12, 1981



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